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In the
Supreme Court of the United States

OCTOBER TERM 1984

HUBERT T. CRABTREE

Petitioner

VERSUS

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In pertinent part, 18 U.S.C. §3143 states that a defendant shall be detained pending appeal of a conviction unless the court finds "that the appeal is not for the purpose of delay and raises a substantial question or fact likely to result in reversal or an order for a new trial." 18 U.S.C. §3143(b)(2). The issue presented is whether the district court properly interpreted this requirement.

ISSUES PRESENTED

A

WHETHER THE DISTRICT COURT IMPROPERLY INTERPRETED THE REQUIREMENT OF 18 U.S.C. §3143 (B)(2) WHICH REQUIRES A SUBSTANTIAL ISSUE ON APPEAL LIKELY TO RESULT IN REVERSAL OR AN ORDER FOR A NEW TRIAL PRIOR TO ALLOWING A DEFENDANT TO REMAIN ON BOND PENDING HIS APPEAL.

B.

WHETHER THE TRIAL COURT'S APPLICATION OF THE 1984 AMENDMENT TO 18 U.S.C. §3143 TO AN OFFENSE WHICH OCCURRED BEFORE ITS EFFECTIVE DATE CONSTITUTES A VIOLATION OF THE PROHIBITION AGAINST EX POST FACTO LAWS.

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PETITION FOR WRIT OF CERTIORARI

The above-named petitioner, Hubert T. Crabtree, pursuant to the provisions of Section 1254(1), Title 28, United States Code, and Rule 20.1 of the United States Supreme Court, herein applies for a Writ of Certiorari to review a decision of the United States Court of Appeal for the Fifth Circuit, rendered on February 22, 1985. (See Exhibit A.) That decision denied petitioner's bail pending the appeal of a judgment of conviction rendered on December 21, 1984. (See Exhibit B.)

I.
Order and Opinion Below

On February 22, 1985, the United States Court of Appeal for the Fifth Circuit, in an opinion written by Charles Clark, Chief Judge, upheld a decision of the district court judge, the Honorable Peter Beer, which denied petitioner's request for bail pending the appeal of his conviction in the instant case. The sole issue presented to the Fifth Circuit was whether or not the district court had correctly applied 18 U.S.C. §3143(b)(2) (hereinafter the Bail Reform Act of 1984). That section of the Bail Reform Act changes the standards to be applied to post-conviction bail from those of a "merely frivolous" appeal to one which places a burden on the defendant to show that the appeal "raises a substantial question of law or fact likely to result in reversal or a new trial."

II.
Statement of Facts

The facts necessary to an understanding of the issues

presented by this Application are as follows: On December 21, 1984, petitioner, Hubert T. Crabtree, was convicted in Case Number 84-103 "M" of the United States District Court for the Eastern District of Louisiana on two counts of "racketeering" under Sections 1962(c) and (d) of Title 18, United States Code. The predicate acts alleged in the indictment, insofar as Mr. Crabtree is concerned, occurred on December 31, 1979 and June 26, 1980. On January 23, 1985, petitioner was sentenced to a prision term of three years and four months on each count and assigned a surrender date of February 6, 1985, although the U.S. Attorney moved for his immediate detention. The U.S. Attorney had made a similar motion on December 21, 1984, when the verdict was returned. On the date of the sentencing, January 23, 1985, petitioner Crabtree filed with the district court a Motion to Remain on Bond Pending Appeal.

This litigation was begun on March 20, 1984, pursuant to an indictment filed in the Eastern District of Louisiana. At that time, petitioner Crabtree was released pursuant to posting a One Hundred Thousand Dollar property bond. He remained on bond during the entire course of the litigation. On December 21, when the jury returned its verdict and the U.S. Attorney moved for immediate incarceration, the district court judge increased petitioner Crabtree's bond to the sum of Two Hundred Fifty Thousand Dollars. This bond was posted and petitioner remained free throughout the sentencing phase and was allowed to surrender to the Federal Correctional Center at LaTuna, New Mexico on February 6, 1985.

On January 25, 1985, the district court denied petitioner Crabtree's Motion to Remain on Bond Pending Ap-

peal. The district court's opinion is set forth in full as Exhibit C. The district court judge based his opinion upon an interpretation of his duties under the Bail Reform Act of 1984 and stated that he was solely concerned with that section of the Act which concerned the gravity and gravamen of the appeal. He stated that he did not feel that the defendants presented a threat to society and that he was not concerned with the likelihood of their fleeing the jurisdiction. (Exhibit D, pp. 39,49,52).

On January 31, 1985, petitioner appealed the district court's decision to the United States Court of Appeal for the Fifth Circuit (Exhibit E), and on February 22, 1985, the Fifth Circuit Court of Appeal, pursuant to a decision written by Charles Clark, Chief Judge, upheld the district court's decision principally because it could not review the district court's opinion regarding the bail without a full transcript of petitioner's trial. (Exhibit A, p.3)

III.
Statement of Issues Presented

In pertinent part, 18 U.S.C.§3143 states that a defendant shall be detained pending appeal of a conviction unless the court finds "that the appeal is not for the purpose of delay and raises a substantial question or fact likely to result in reversal or an order for a new trial." 18 U.S.C.§3143(b)(2). The issue presented is whether the district court properly interpreted this requirement.

IV.
Statement of Relief Sought

Petitioner seeks an Order of the Honorable Court reversing the district court's denial of his Motion to Remain on Bond Pending Appeal, and releasing him on bond pending the appeal of his conviction by properly interpreting Section 3143(b)(2) of Title 18 of the United States Code. Alternatively, petitioner seeks the remand of the issue back to the trial court for a decision on petitioner's Motion to Remain on Bond Pending Appeal in light of the proper interpretation of that law. Petitioner also requests a writ issue ordering his release pending the outcome of this writ.

V.
Reasons Why Writ Should Issue

On January 23, 1985, the date of petitioner's sentencing and the filing of his Motion to Remain on Bond Pending Appeal, the district court judge stated that he was solely concerned with the provisions of Section 3143(b)(2), the Bail Reform Act of 1984, which changes the standard for remaining free on bond during the pendency of an appeal from a determination by the trial court that the appeal was "merely frivolous" (18 U.S.C. §3148) to one which places a substantial burden on the defendant to show that the appeal raises a substantial question or fact likely to result in reversal or an order for a new trial." 18 U.S.C.§3143 (b)(2). (Exhibit D, p.52). The district court's opinion at Exhibit C addresses that section of the law, making it clear that its decision to deny petitioner bail pending appeal rested solely on its interpretation of that section. In sum, the district

court states that it "did agree in all respects with their (the jury's) verdict as to each count involving each defendant . . ." and then stated:

> "I have no hesitation in concluding that the trial generated no substantial questions of law or fact which are likely to result in reversal on appeal. Nor were there any substantial questions of law or fact which will result in an order for a new trial." (Exhibit C, p.2).

On the basis of this observation, the district court denied petitioner's Motion for Bail Pending Appeal. The judge continued in that ruling:

> "Congress has done no more (and no less) than to conclude, in their legislative wisdom, that judicial officers shall order a person who has been found guilty of an offense and sentenced to a term of imprisonment and who has filed an appeal (or a Petition for a Writ of Certiorari) to be detained unless the appeal raises a substantial question of law or fact likely to result in reversal or an order for a new trial. Having here made the determination that such is not here, the case, defendant's motion for bail pending appeal must be denied." (Exhibit C, p.4).

It is noteworthy that the trial court had just denied various and numerous motions in arrest of judgment and motions for a new trial filed by the various defendants.

Thus, the trial court judge made a ruling that he found no substantial questions of law raised at the trial of the matter. At the same time as he denied all defendants' requests of post-conviction relief. It is submitted that to do otherwise would have been illogical on his part. The U.S.

Court of Appeal for the Fifth Circuit then held that the Bail Reform Act may be applied retrospectively, holding that the law was procedural rather than substantive. Chief Judge Clark also stated that, since a transcript of the entire proceedings below was not available and because each of the decisions called for both factual and legal determinations, he was incapable of reversing the district court judge absent such a transcript. (Exhibit A, p.3).

Thus, Chief Judge Clark treated the matter differently than did the Third Circuit Court of Appeal in *U.S. v. Miller,* 753 F.2d 19 (3rd Cir. 1985) (App.G) and the Ninth Circuit Court of Appeal in *U.S. v. Handy,* ____F.2d____(9th Cir. Feb. 20, 1985, No. 85-3001). As a matter of fact, a co-defendant in this same matter, Dr. Salvatore Canale, also was judged by a different standard. *(U.S. v. Canale,* ____F.2d____,No.85-3050, March 28, 1985).

VI.
Issue Presented

A.

WHETHER THE DISTRICT COURT IMPROPERLY INTERPRETED THE REQUIREMENT OF 18 U.S.C. §3143(B)(2) WHICH REQUIRES A SUBSTANTIAL ISSUE ON APPEAL LIKELY TO RESULT IN REVERSAL OR AN ORDER FOR A NEW TRIAL PRIOR TO ALLOWING A DEFENDANT TO REMAIN ON BOND PENDING HIS APPEAL.

B.

WHETHER THE TRIAL COURT'S APPLICATION OF THE 1984 AMENDEMENT TO 18 U.S.C. §3143 TO AN OFFENSE WHICH OCCURRED BEFORE ITS EFFECTIVE DATE CONSTITUTES A VIOLATION OF THE PROHIBITION AGAINST EX POST FACTO LAWS.

VII.
Argument

A.

WHETHER THE DISTRICT COURT IMPROPERLY INTERPRETED THE REQUIREMENT OF 18 U.S.C. §3143(B)(2) WHICH REQUIRES A SUBSTANTIAL ISSUE ON APPEAL LIKELY TO RESULT IN REVERSAL OR AN ORDER FOR A NEW TRIAL PRIOR TO ALLOWING A DEFENDANT TO REMAIN ON BOND PENDING HIS APPEAL.

The Bail Reform Act of 1984, 18 U.S.C.§3143, requires that a defendant moving for post-conviction bail demonstrate:

> "...that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial." 18 U.S.C. §3143(b)(2)

Petitioner does not contend that he has a constitutional right to post-conviction bail. This has never been

held to be an outgrowth of the Eighth Amendment's Excessive Bail Clause. In fact, this argument has been specifically rejected. *Carlson v. Landon,* 342 U.S. 524, 72 S.Ct. 525 (1962). Nor does petitioner claim that he is necessarily entitled to bail pending appeal under the current rules of the Fifth Circuit Court of Appeal. *U.S. v. Bright,* 541 F.2d 471, 477 (5th Cir. 1976), *cert. denied* 430 U.S. 935 (1977). It is petitioner's contention, however, that the Bail Reform Act of 1984 must be read in such a way as to make it a meaningful statute since Congress undoubtedly had the power to completely outlaw post-conviction bail and chose not to.

The January 25, 1985 Minute Entry (Exhibit C) in this matter, in which the trial court denied applicant's motion to remain on bond, contained only the district court's conclusion as to the absence of substantial issues. It did not address any of the issues which applicant raised in his Motion to Remain on Bond Pending Appeal (Exhibit B.) In fact, several co-defendants in the matter filed similar motions which contained issues which they considered substantial and these were not addressed either. The trial court offered only the conclusion that no such issues exist:

> "...though certain decisions which the government's attorneys made with respect to the method of presentation of their case may have been different than those which I might have made under the circumstances, I have no hesitation in concluding that the trial generated no substantial questions of law or fact which are likely to result in reversal or appeal. Nor were there any substantial questions or law or fact which will result in a new trial." Minute Entry, January 25, 1985. (Exhibit C).

The trial court then concluded:

> "Having made the determination that such is not here the case, defendants' motions for bail pending appeal must be denied." Minute Entry, January 25, 1985. (Exhibit C).

The trial court judge stated the same at the time of the sentencing saying:

> "Now, I've got to say there isn't any issue existing at this time, which I perceive to be responsive to the conditions that are imposed by this provision of the law, and as Congress has, in their wisdom, seen fit to enact." (Exhibit D, pp.47-48).

It is submitted that the trial court could not find otherwise, having just denied numerous motions in arrest of judgment and motions for a new trial filed by various defendants herein. This highlights the highly illogical position in which a trial court judge is placed if 18 U.S.C. §3143(b)(2) is interpreted as it was by the district court in this matter. The Third Circuit Court of Appeals reversed a similar line of reasoning in *U.S. v. Miller,* 753 F.2d 19 (3rd Cir. 1985). In that case the trial court felt, as did the trial court in the instant case, that he was required to find that one or more of its orders was likely to be reversed on appeal in order to permit a post-conviction bond. The Third Circuit reversed and remanded the decision reasoning that to do so was illogical and would in fact make the federal courts "bookmakers." It adopted, instead, a four-part test for determing whether a bond pending appeal should be granted. None of that was done in this instance.

Any discussion of post-sentence bail must begin with two basic premises. The first is that bail is essential to make meaningful the right of appeal. The second is that

Congress could, in fact, outlaw completely post-conviction bail but has chosen not to. The, second, it is submitted, is a reflection upon the importance of the first. Given the fact that Congress chose not to simply outlaw post-conviction bail, it is incumbent upon this Court to closely examine any interpretation of 18 U.S.C. §3143(b)(2) that would in effect deny post-conviction bail in all cases. Thus, the dilemma within which a trial court judge finds himself. As Judge Katz pointed out in *U.S. v. Meloni* (attached hereto as Exhibit F):

> "Now, the due process rights of the Constitution also guarantee that the defendant have an impartial tribunal deciding material issues. It's difficult for me to understand how an impartial judge would deny post-trial motions and then certify he is likely to be reversed on appeal. I can't conceive really how that is done. A statute which requires a court to make that determination before granting release on appeal does, to my mind, raise at least constitutional concerns." *Meloni, supra,* (Exhibit G) p.6.

Judge Katz continues in that case to effectively interpret the Bail Reform Act in a manner which is not abhorent to the Constitution and, in fact, makes it an effective piece of legislation. He distinguishes between those cases which merely present substantial legal issues and those which present substantial legal issues where there is no legal impediment to reversal by *stare decisis* or otherwise. Thus, a defendant may raise a substantial legal issue which has been passed upon by the U.S. Supreme Court, This type of issue would be one where the chances of reversal are remote. On the other hand, a defendant may raise those types of issues, such as sufficiency or admissibility of

evidence which must be reviewed on a case by case basis which bear no impediment to reversal. These types of issues are at the very heart of Mr. Crabtree's appeal and are the types of issues which cry for resolution by an impartial tribunal, which has not already had to rule on them during the trial.

In Mr. Crabtree's motion to remain on bond pending appeal, five issues were raised as serious issues for appeal:

a) The presence of a "contaminated" juror on the panel during the trial of the matter;

b) The lack of evidence of two seperate predicate acts as is required under 18 U.S.C. §1962;

c) The lack of evidence pertaining to the ruling of the trial court pursuant to *James* motions filed therein;

d) The impropriety of government counsel's rebuttal argument;

e) The admissibility of prejudicial tapes concerning Mr. Crabtree's wife.

Briefly, as to a) above, on the morning of the second day of the trial of the matter, an article appeared in the Major local daily newspaper (attached herein as Exhibit G) which contained a reference to co-defendant Provenzano's prior conviction. It should be noted that the government's theory of the case as reflected by testimony and, indeed, as demonstrated on charts displayed to the jury, was that defendant Provenzano was the titular and *de facto* head of an organized racketeering enterprise. He was, in effect, the hub of the illegal enterprises alleged. He was the sole defendant named in every count of the indictment. The trial court had not instructed the jury to disregard any media reports of the trial and, on motion of the defense after this article appeared, examined the jury to determine if any of the jurors had read the article. Three jurors indicated that

they had. All of the jurors were then sent to the jury deliberation room and the three who had indicated that they had read the article were called back into the courtroom individually and examined by the court. In the court's examination of the first juror, the court asked her if she had read of Mr. Provenzano's prior conviction as it was related in the article. While the juror said she did not recall noticing anything about the conviction, the very fact that Mr. Provenzano had been so convicted was brought to her attention inadvertently by the court. (See generally, Exhibit H, trial transcript dealing with that issue).

It is noteworthy that this prior conviction concerned an attack on a government witness with a shovel handle. That witness was, in fact, one of the chief government witness in the present trial. The juror was then instructed to return to the jury room and send out the next juror who had indicated having read the article. No admonishment was given to that juror to refrain from discussing with the other jurors what had occurred in court out of their presence. The two ramining jurors who had stated that they read the article were then examined without incident and returned to the jury deliberation room. The juror who had been initially examined was subsequently released from the jury and replaced by an alternate. The critical issue revolves around the lack of admonishment to the juror and the fact that she remained in the presence of the balance of the jury for some period of time after she was acquainted with this fact. It is also noteworthy that defendant Provenzano elected *not* to testify in this matter, and thus, this was the only way that the jury had of knowing of his prior conviction.

As to the lack of evidence of two separate predicate

acts, it is submitted that the government failed to prove that Mr. Crabtree participated in two separate predicate acts as required under 18 U.S.C §1962. He was alleged to have been involved in those two counts of the indictment which came to be known as Oil Patch I and Oil Patch II. These activities centered around two alleged aggravated arsons of a barroom in south Louisiana named The Oil Patch Lounge. The first arson occurred December 31, 1979 and the second occurred June 26, 1980. One government witness testified as to Mr. Crabtree's involvement in the planning of each. It was never alleged that he was present when the arsons occurred. The only evidence that the government could offer as to the first arson of the Oil Patch was through a witness named John Toal who testified merely that Mr. Crabtree was present when the arson of December 31, 1979 was discussed. He made no reference to Crabtree's participation in the planning or actual execution of the deed. Noteworthy under this heading is the fact that there was no physical evidence of Crabtree's involvement nor was he intercepted or recorded in any fashion in the over seven hundred hours of government wiretaps and consensual recordings in this matter.

Regarding the lack of evidence pertaining to the ruling pursuant to the "James" motions filed, it is submitted by the defense and will be argued most vigorously on appeal, that there was no independent evidence of Crabtree's involvement in a conspiracy as required by *U.S. v. James*, 590 F.2d 575 (5th Cir.) (en banc) *cert. denied* 442 U.S. 917 (1979). As stated above, he was not intercepted on any Title III wiretap nor was he recorded by any of the government informants in this matter during their extensive consensual taping of other defendants. Further, as stated above, there was no physical evidence of Crabtree's in-

volvement whatsoever.

Also on appeal in this matter will be the impropriety of government counsel's rebuttal argument which contains several *ad hominum* arguments, directed at various defendants and their counsel. Obviously this issue cannot be fully discussed until the entire transcript is prepared. That this circuit has, however, treated this in a serious fashion.

As to e) above, prior to the trial of the matter, both your petitioner's and defendant Provenzano's wife were placed under subpoena by the government. At trial, a tape was introduced into evidence by the government wherein these two discussed the possible sale of stolen goods. The government then elected to call neither as a witness after having introduced the tape through an informant who said that he could identify the voices of the participants. It is submitted that the tape was absolutely irrelevant to the matter at trial because neither woman was charged in the indictment and there were no counts against any defendant involving stolen goods. Further, Crabtree was in no way even alleged to have known of that particular act. In short, it served only to show a proportedly deep relationship between Crabtree's family and Provenzano's family. This could only serve to, if not inflame the jury, at least show that Mrs. Crabtree as well as defendant Crabtree knew people whom the government thought to be evil.

It is also noteworthy that in Chief Judge Clark's opinion he stated that, absent a transcript or a stipulation as to the facts, he could not overturn the trial court's decision since that judge was more familiar with the factual and legal issues presented. (Exhibit A, p.3). Thus, it would seem that the availability of post-conviction relief to a defendant would hinge, more than ever, on his ability to

finance his defense, In this case three of the seven defendants were represented by appointed counsel, having been found indigent at the outset of the litigation. These defendants would be precisely in petitioner's position now were they applying for this type of relief. Had your petitioner anticipated this problem, he may well have been able to afford a private court reporter who could have provided him with daily transcripts. He would, then, have the transcript necessary in order to proceed while his co-defendants would have to remain in jail pending the production of the transript in the ordinary course of the appellate process. Parenthetically, that transcript is still not available. If this standard is to be invoked, every indigent defendant will have to request fees for an independent court reporter to provide him with daily transcripts so that he can remain on the same footing as a more wealthy co-defendant.

II.

WHETHER THE TRIAL COURT'S APPLICATION OF THE 1984 AMENDMENT TO 18 U.S.C. §3143 TO AN OFFENSE WHICH OCCURRED BEFORE ITS EFFECTIVE DATE CONSTITUTES A VIOLATION OF THE PROHIBITION AGAINST EX POST FACTO LAWS.

As stated above, the instant offenses for which your defendant has been convicted occurred in 1979 and 1980. On October 12, 1984, Public Law No. 94-473, 98 Stat. 1837 was signed into law. Title II of that statute bears the popular name "Comprehensive Crime Control Act of 1984." Within Chapter I of the Act is found the law regulating bail and is popularly referred to as the "Bail Reform Act of 1984." This law substantially revised the

rules governing bail pending appeal. Both the old and new laws set up a two-prong test to determine whether or not a convicted defendant could remain on bond pending the completion of the appeal. The first hurdle was and is a requirement that the defendant show by "clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or to the community if released." 18 U.S.C. §3143(b)(1). The revision now requires the defendant to also demonstrate that the appeal is not "for the purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial." 18 U.S.C. §3143(b)(2). The prior statute, 18 U.S.C. §3148, required a finding that the appeal was not frivolous or merely taken to delay proceedings. It should be noted that Rule 9(c) of the Federal Rules of Appellate Procedure made it clear that, while the burden was on the applicant to establish the absence of the likelihood of flight or danger, the burden for establishing that the appeal was frivolous or dilitory was placed squarely on the government.

Further, it should again be noted that the trial court judge stated that he was only concerned with the second element of the test in this case, and was not concerned with the likelihood of flight or the defendants posing a danger. The question is, then, one of interpretation of 18 U.S.C. §3143(b)(2) and its applicability to a defendant who was convicted of crimes which occurred before its date of enactment.

Counsel could find no published opinions dealing with the application of the pertinent amendments to offenses predating the effective date or with the interpretation of the statute as a whole. It is submitted that because the

Bail Reform Act of 1984 has only been in effect since October 12, 1984, that this issue is *res nova*.

While it is hornbook law that a procedural change in the law is applicable immediately to all cases pending, Judge Susan Getzendanner, United States District Judge for the Northern District of Illinois, Eastern Division, in *United States v. Cirrincione* (attached hereto as Exhibit I), pointed out that there are procedural matters which may have sufficient effect upon a defendant's substantive rights as to cause them to fall within the ambit of the *ex post facto* prohibition. She then continued, citing *Weaver v. Graham*, 450 U.S. 24 (1981), that the test to determine whether or not a penal law can be held to be *ex post facto* is as follows:

> "...It must apply to criminal acts occurring before its enactment into law, and it must disadvantage the offender affected by it. The Bail Reform Act of 1984 facially fits these criteria. First the act retrospectively affects all defendants whose crimes occurred before the effective date of the Act, October 12, 1984. Second, the Act severely limits the availability of bond pending appeal and is disadvantageous to defendants who routinely seek to delay commencement of their sentences by obtaining release on bail pending appeal." *Cirrincione, supra*, (Exhibit __) p.6.

It should be clear that the effects of this Act are punitive and disadvantageous to Crabtree. It is very likely that he will have served a substantial portion of his sentence prior to the time that this litigation is finally resolved. Should his conviction be reversed or set aside altogether and a verdict of acquittal entered, he would then have been denied his liberty needlessly and for a substan-

tial period of time. This increase in the likelihood of an unjust incarceration cannot be rationally viewed as a simple matter of procedure. Analogizing the instant case to the situation addressed in *Weaver, supra*, wherein the Supreme Court found that a statute reducing "good time" credits was an *ex post facto* application of the law it is clear that application of the Bail Reform Act of 1984 to offense committed before the effective date of the Act is similarly violative of that prohibition.

VIII.
Conclusion

In short, if the Bail Reform Act of 1984 is given the construction afforded to it in this case, it will be either unworkable or illogical. Either a defendant will have to be able to afford private transcription services or the trial court judge will be placed in the position of having to deny a post-conviction motion regarding new trial issues and then having to reverse himself by finding substantial legal issues will be raised.

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